NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 BRADDOCK ROAD • SPRINGFIELD, VIRGINIA 22160

Mark Mix, *President*

(703) 321-8510/Fax (703) 321-9319
http://www.nrtw.org

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Denise M. Boucher
Director of the Office of Policy, Reports and Disclosure
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, NW
Room N-5609
Washington, DC 20210

RE: Proposed Rescission of January 2009 LM-2 and LM-3 Final Rule (29 CFR Parts 403 and 408, RIN 1215-AB62); The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA)

Dear Director Boucher:

I am respectfully submitting comments on behalf of The National Right to Work Legal Defense Foundation, Inc.

The National Right to Work Legal Defense Foundation, Inc. ("Foundation") is a charitable, legal aid organization formed to protect the Right to Work, freedoms of association and speech, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. Through its staff attorneys, the Foundation aids employees who have been denied or coerced in the exercise of their right to refrain from collective activity.

Today, Foundation attorneys are representing tens of thousands of employees in more than 200 cases nationwide.

The Foundation's staff attorneys have served as counsel to individual employees in many Supreme Court cases involving employees' rights to refrain from joining or supporting labor organizations, and thereby have helped to establish important precedents protecting employee rights in the workplace against the abuses of compulsory unionism. These cases include: Davenport v. Washington Education Ass'n, No. 05-1589 551 U.S. 177 (2007); Air Line Pilots Ass'n v. Miller, 523 U.S. 866 (1998); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991); Communications Workers v. Beck, 487 U.S. 735 (1988); Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986); Ellis v. Railway Clerks, 466 U.S. 435 (1984); and Abood v. Detroit Board of Education, 431 U.S. 209 (1977).

Introduction

The Department should withdrawal its current Notice of Proposed Rulemaking (NPRM) for two reasons: 1) the Department's proposed action exceeds the Secretary's authority, and 2) the Department has failed to uniformly apply its regulation.

I. Necessary to Prevent the Circumvention or Evasion

In 1959, Congress narrowly limited the Secretary's regulatory discretion under the LMRDA to take regulatory action only if it is "necessary to prevent the circumvention or evasion" of union reporting obligations Section 208 (29 U.S.C. 438). The Secretary and the Department failed to address its intended actions with regard to this expressed statutory mandate.

Rescission Exceeds Secretary's Authority[i]

> **Rules and regulations; simplified reports**
>
> The Secretary shall have authority to issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed under this subchapter and such other reasonable rules and regulations (including rules prescribing reports concerning trusts in which a labor organization is interested) as he may find necessary to prevent the circumvention or evasion of such reporting requirements. In exercising his power under this section the Secretary shall prescribe by general rule simplified reports for labor organizations or employers for whom he finds that by virtue of their size a detailed report would be unduly burdensome, but the Secretary may revoke such provision for simplified forms of any labor organization or employer if he determines, after such investigation as he deems proper and due notice and opportunity for a hearing, that the purposes of this section would be served thereby. (Emphasis added)

Based upon the Department's reasoning, the Secretary will exceed her statutory authority if she rescinds the 2009 LM-2 reform. The LMRDA limits the Secretary's ability to rescind a rule to specified circumstances: *if it will "prevent the circumvention or evasion" of the Act.* The Department has provided no reason how rescission will enhance disclosure by reducing "circumvention or evasion." Rather the Secretary concedes disclosure will be undermined by rescission.

The Secretary's authority is limited by the prevent *circumvention or evasion* standard expressly mandated by Congress in 1959. The Department's current NPRM simply fails to comply with this mandate and therefore the proposed withdrawal is *ultra vires*[ii].

CONGRESSIONAL DEMAND CHANGE TO PREVENT...

The 106th Congress' *Report on the Financial Operating and Political Affairs of the International Brotherhood of Teamsters*[iii] concluded that the Form LM-2 was inadequate and the utility of the forms would be greatly increased by fully disclosing all union paid benefits by officer name. The January 2009 LM-2 reform implemented the congressionally demanded increased disclosure; a change that the Department now inexplicably intends to rescind.

Reporting on U.S. Labor Department Forms

The Subcommittee finds that the IBT [Teamsters] did not fully disclose to rank and-file members, the U.S. Department of Labor, or the general public all of the benefits and reimbursements paid to its employees and officials. The limited disclosures are primarily the result of inadequacies in the current reporting system in place at the DOL. The Subcommittee recommends that the Department of Labor consider changing regulations to require full and fair disclosure of significant financial matters, including:

- Full disclosure of all benefits paid to each officer and employee.
- Full disclosure of all travel-related expenses by union officers and employees, regardless of whether those costs were paid through credit arrangements.
- Full disclosure of all spending by category.

Then-Teamsters' General Counsel Judy Scott advised[iv]:

"[I]f you release that kind of information on a LM-2 Form into the field, it would serve as a basis [for] attacking Ron [Carey] that somehow he was giving major wage increases to people at a time that the finances were in difficulty."

Teamster lawyer Scott knew in 1992 and knows now that the exposure of greed and self-enrichment can bring down even the most entrenched union official. That is why she recommended that the Teamsters continue to hide its extravagant "benefits package" that includes the "benefit" of the union paying personal income taxes.

Surely, the Department does not want to continue allowing all unions to hide these perks from the workers forced to finance them.

Imagine, as Sen. Kennedy, Rep. Griffin, and others did in 1959, that union officials having to report their benefits package would carefully think about how each perk might affect their re-election. This moment of pause, this self-interest regulated self-control created by the transparency, not only empowers union autonomy, it creates fiscal restraint.

For example, Longshoreman's Union Boss, Richard J. Hughes, Jr., returned to the union treasury a $739,729 cash payout after his cash "benefit" was accidentally reported on the union's LM-2 report and became public.

The LM-2 disclosure of this particular union boss' benefit saved the Longshoremen's Union almost a quarter-million dollars. Now extrapolate that savings across all LM-2 filers that dole out these large payments to union officers.

Compare the $739,729 that the Longshoremen's Union saved to the AFL-CIO's actual cost of the 2003 Final Rule. John Sweeney stated that LM-2 reform was going to cost each international union a million dollars and a billion total per year. However, it only cost the AFL-CIO about $60,000 to comply.

Clearly, just one slip and the exposure of just one union boss' benefit resulted in a union saving almost a million dollars proves that the benefits resulting from transparency outweigh any nominal costs associated with the one time set-up. It is likely that the complicated personal income tax reimbursement plans probably create many more accounting headaches than the LM-2 report will.

II. DOL's New Regulatory Review Standard

A second purported Departmental "justification" for union financial disclosure repeal is a newly created regulatory standard that requires an "experience" review of past regulations. Simultaneously, the Department ignores its new review standard by rescinding the January 2009 Final Rule without providing an "experience" review.

The Department stated[v]:

> "A review of the usefulness of the information that has been reported since the Form LM-2 was revised in 2003, as well as an examination of data regarding the burden placed on unions by that revision, will provide a better basis for determining whether additional changes are necessary in order to properly balance the need for transparency with the need to protect unions from excessive burdens imposed by reporting and disclosure requirements." (Emphasis added)

Ergo, if a review is necessary to determine the usefulness of a regulatory action and the lack of such review is just cause to stop a regulatory action, then the Department must,

using its own standard, perform a review of the usefulness of the information that has been reported since the Form LM-2 was revised in 2003 before it rescinds the rule. And, of course, it would need to fully disclose the facts and results from its review and allow the public to comment.

Since the Department is ignoring its own reason for rescinding the January 2009 Final Rule (a review of the usefulness of the information that has been reported since the Form LM-2 was revised in 2003 needed to be performed by the Department), this newly invoked *historical review standard* logically is no justification for rescission of the 2009 since this condition precedent has not yet occurred!

Indeed, the "experience" standard should apply to current, past, and future DOL rulemakings as well as the instant proposal.

Once the Department announced its standard that a pre-rulemaking review is a condition precedent before a rulemaking is valid, the DOL must obey its own standard and withdraw its intent to rescind the 2009 LM-2 until the Department has completed a review, made the results of the review public, and published a new NPRM allowing the public to comment on its plans – an agency must follow its procedural regulations.[vi]

III. Secreatary's Authority to Revoke Form LM-3 Privilege

The Department does not need a regulation to revoke the Form LM-3 privilege; by statute the Secretary may revoke the privilege.[vii]

> Every labor organization shall adopt a constitution and bylaws and shall file a copy thereof with the Secretary, together with a report, signed by its president and secretary or corresponding principal officers, containing the following information ...
>
> In exercising his power under this section the Secretary shall prescribe by general rule simplified reports for labor organizations or employers for whom he finds that by virtue of their size a detailed report would be unduly burdensome, but the Secretary may revoke such provision for simplified forms of any labor organization or employer if he determines, after such investigation as he deems proper and due notice and opportunity for a hearing, that the purposes of this section would be served thereby. (Emphasis added)

"The Secretary may revoke such provision for simplified forms of any labor organization or employer if he determines...." There is no need for a rulemaking to provide the Secretary a power that she already possesses.

The Department claims that LM-3 filers would be unable to produce the records necessary to file the LM-2 report. However, these unions are required by statute to maintain the necessary records, even if the union does not file an LM-2 report.

Part of the Department's Justification for Rescission[viii]:

> "Based on consideration of these comments, the Department now concludes that there is no realistic likelihood that most small unions would have the information or means to file the more detailed Form LM-2 and that the revocation procedures established by the January 21 rule will be unlikely to result in more disclosure." (Emphasis added)

The Department's Position Contradicts the Statutory Requirements of ALL LM-30 Filers[ix]:

> SEC. 206. Every person required to file any report under this title shall maintain records on the matters required to be reported which will provide in sufficient detail the necessary basic information and data from which the documents filed with the Secretary may be verified, explained or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than five years after the filing of the documents based on the information which they contain. (Emphasis added)

The Act requires LM-3 Filers to have the necessary information to file an LM-2 and therefore the Department's statement that there is "no realistic likelihood that most small unions would have the information" necessary to complete an LM-2 is contradicted by statutory requirements.

IV. Department's Cost-Benefit Analysis One-Sided

The Department's Cost-Benefit analysis is taken from the exclusive perspective of union officers and not others who benefit from the Rulemaking, particularly the one that the Act itself was intended to benefit – the union members, fee-payers, and public at-large. The LMRDA was created to allow members a chance to have some say in their union's finances; therefore, the Act essentially requires the Department to look at its actions from the point of view of the union members.

The Department's cost-benefit analysis position from the union official perspective undermines the LMRDA, and it created a skewed cost-benefit analysis that ignores cost-benefit analysis from the perspective of the people who pay into union treasuries as a condition of working. These are the people who actually pay the "costs" being analyzed. And it is their perspective that Congress intended the LMRDA to address, and we believe the Department should consider the cost-benefits from their perspective.

The following recent news article reveals the true cost savings (benefit) from disclosure:[x]

> EXCLUSIVE: Union head returns some of $1.2M pay
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> The president of a maritime workers union - a labor organization dogged for years by declining membership and a federal racketeering lawsuit - reported receiving $1.2 million in compensation last year but abruptly gave back much of the money in April … Even after giving back more than half his compensation, Richard J. Hughes Jr. of the International Longshoreman's Association still earned $494,635 in salary and expenses in 2008… The longshoreman's union filed a report [Form LM-2] with the government in March showing that Mr. Hughes was paid $739,729 in 2008 from the union's "retirement equalization" plan.
>
> "When he saw the payment and matched it against the finances of the union, he turned it back in," union spokesman Jim McNamara said of Mr. Hughes' decision. "He was entitled to it, but he made a decision to turn it back in."
>
> "I'd be concerned if I were a member, because the president is making a straight salary of almost a half-million dollars," said Gary N. Chaison, professor of industrial relations at Clark University in Massachusetts. "That compensation seems very high.
>
> "It always raises a red flag when someone returns part of their compensation."
>
> "It sounds awfully convoluted, to say the least," said Marick Masters, a labor scholar at Wayne State University in Detroit. He said he did not understand why the $1.2 million figure was reported in the first place, since both Mr. Hughes and the union's treasurer signed the federal disclosure document.

While ignoring the costs to members of non-disclosure, the Department has argued that the 2003 LM-2 reform costs were significant. Yet, there seems to be little actual evidence of this (see our previous comments regarding the AFL-CIO reported costs that were significantly less than projected). Further evidence is available on the Internet and provided by a company that completes LM-2 report for several unions. It has developed an E-Z low-cost LM-2 Reporting and filing system.

> "We can use our specialized software to extract data from almost any accounting system, then using our EZ-LM2 software we can process your data and prepare your LM2 with little or no manual entry. We extract your data and after making any necessary adjustments to it we process it and load it directly into the Department of Labor's Form LM-2!" [Emphasis added]

According to LM-2 reports, unions paid the following in 2008 to file their LM-2 reports:

LM-2 Filer Organization Name	State	Payer/Payee Name	2008 Purpose	Amount
LONGSHOREMENS NAT'L HEADQUARTERS	NY	JayStar Group Inc.	LM-2 preparation	$ 12,864
AFL-CIO NAT'L HEADQUARTERS	DC	JAYSTAR GROUP INC.	LM2 Support	$ 10,000
SEIU Local 1021	CA	JayStar Group, Inc.	Deposit 2008 LM2 filing	$ 6,500
UNITE JOINT BOARD	MD	JayStar	2007 LM2 service fee-L.25 JB	$ 6,250
UNITE JOINT BOARD	MD	JayStar	Deposits - 2007 LM2 filings	$ 6,250
LONGSHOREMENS DISTRICT	NY	Jaystar Group Inc.	LM2 Processing Fee	$ 6,194
AFT STATE FEDERATION	NJ	Jaystar Group	LM2	$ 6,000

Therefore, we respectfully request that the Department consider the benefits of disclosure to members and the public in an effort to determine the true costs and benefits of the current January 2009 LM-2 Final Rule.

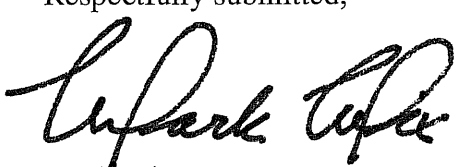
Conclusion: Department's LM-2 Rescission Unjustified

The Secretary offers no statutorily justifiable reason to rescind the January 2009 Final Rule. This rescission incapacitates full financial disclosure undercutting the Secretary's express statutory mandate "to prevent the circumvention or evasion of such reporting requirements." Instead, the Department has championed union officials over its fundamental obligation to union members, employees, and the general public.

The Department also creates a new pre-Rulemaking Review Standard that it promptly ignored.

Here, the Secretary has contravened an express congressional statutory mandate and the Department's own pre-rulemaking procedural standard. Such evasion is lawless administrative action.

Respectfully submitted,



Mark Mix
President

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[i] U.S. Code – Title 29, SUBCHAPTER III—REPORTING BY LABOR ORGANIZATIONS, OFFICERS AND EMPLOYEES OF LABOR ORGANIZATIONS, AND EMPLOYERS, § 438. Rules and regulations; simplified reports

[ii] Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837,843 (1984), (agency must adhere to unambiguously expressed intent of Congress).

[iii] Subcommittee on Oversight and Investigations of the Committee on Education and the Workforce, *Report on the Financial Operating and Political Affairs of the International Brotherhood Teamsters* (1999)

[iv] Ibid. Page 110

[v] 4/21/2009 NPRM Page 18175

[vi] Berkovitz v. United States, 486 U.S. 531, 544 (1988) (agency has no discretion to deviate from its own procedures).

[vii] 29 U.S.C. 438

[viii] 4/21/2009 NPRM Page 18176

[ix] 29 U.S.C. 436

[x] EXCLUSIVE: Union head returns some of $1.2M pay, Jim McElhatton, *The Washington Times* (5/11/2009)